BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Melva Snowling dated November 18, 1990, alleging discrimination in employment on the basis of sex and reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Melva Snowling

Complainant

- and -

The Corporation of the City of St. Catharines
Lawrence Tufford
James Brady

Respondents

INTERIM DECISION

Adjudicator : Susan Tacon

Date : April 9, 1996

Board File No: BI-0013-94

Decision No : 96-010-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Raj Anand, Counsel
Melva Snowling	)	On her own behalf
The Corporation of the City of St. Catharines	)	Michael Hines, Counsel
Lawrence Tufford and James Brady	)	Michael Hines, Counsel

IN THE MATTER OF a Board of Inquiry

appointed pursuant to s. 38(1) of the

Human Rights Code, R.S.O. 1990, c. H.19, as amended,

BETWEEN:

MELVA SNOWLING

Complainant

- and -

THE CORPORATION OF THE CITY OF ST. CATHARINES
LAWRENCE TUFFORD AND JAMES BRADY

Respondents

Date of Complaint: November 28, 1990

Date of Interim Decision: April 9, 1996

Adjudicator: Susan Tacon

Appearances:

Raj Anand, Ian Anderson on behalf of the Commission
Lazlo Pandy, Melva Snowling on behalf of the Complainant
Michael Hines on behalf of the Respondents

INTERIM DECISION

This ruling deals with a motion of the respondents that an amendment of the "will say" statement of Lori Rainone, a witness whom the Commission intends to call, should be accepted provided that that counsel for the respondents be permitted to testify about a meeting on October 9, 1991 without removing himself as counsel of record in this proceeding.

Before dealing with the submissions of the parties, it is necessary to briefly sketch the context in which the motion arises.

The instant hearing is currently dealing with an abuse of process motion brought by the respondents against the Commission in which the respondents seek, inter alia, the termination of the proceedings without a hearing on the merits. In addition to the abuse motion, several other preliminary motions have been raised by one or other of the parties. Some of those motions have been decided orally or in other interim decisions. One such motion, that of the Commission to have counsel for the respondents removed as counsel of record, has been reserved as there was then no objection to counsel acting in respect of the abuse motion.

The evidence tendered by the parties with respect to the abuse motion has occupied a number of hearing days and further days are scheduled. The documentary material is voluminous. In an effort to expedite the hearing of the abuse motion, I directed the parties to file will say statements with respect to the expected evidence of those witnesses each intended to call. As each witness testified, the direct examination would consist of the affirmation of the accuracy of the will say statement. The witness would then be cross-examined. In this manner, considerable hearing time would be saved (in direct examination and in preparation for cross-examination) without derogating from the opportunity of each party to call the evidence it considers relevant to the issue in dispute.

The will say statements were produced in March 1995. Immediately prior to the recommencement

of the hearing in January 1996, counsel for the Commission sought to file an amended will say statement of Lori Rainone. The amendments objected to by counsel for the respondents deal with Rainone's revised recollections of a meeting on October 9, 1991 with the respondent James Brady and respondents' counsel.

The submissions of the parties were directed to be filed in writing by specified dates and are here only briefly summarized.

Counsel for the respondents argues that the amended will say places in dispute for the first time the recollection of Brady regarding the October meeting. Another ruling admitting what was referred to as the "Hines letter", it was argued, identified the weakness of the Commission's evidence on the point, evidence which it now wishes to buttress through the amended will say. Counsel submitted that it was not necessary to earlier consider replacing himself as counsel because the October 1991 meeting was not in dispute. To require counsel to remove himself at this point would inflict considerable financial costs on the respondents and result in the cancellation of many of the hearing dates. Counsel recognized that the respondents were requesting an indulgence of the Board in permitting him to testify but contended that was appropriate so that the Commission would not benefit from the timing in filing the amended will say.

Commission counsel rejected the assertion that the events of the October 1991 meeting were not in dispute. Further, it was argued that the original will says of the Commission witnesses (Rainone and Young) were in conflict with thoses of the respondents (Brady and Tufford). Counsel argued that, when Rainone's will say was reviewed with her prior to the January hearing dates, her sharpened recollection was revealed and the Commission was obligated to file the correction. With respect to the request that counsel for the respondents be permitted to testify without removing himself as counsel of record, counsel asserted that such testimony would taint the proceedings and referred, in support, to judicial comment on the propriety of counsel giving testimony and Rule 10 of the Law Society's Code of Professional Conduct.

In reply, counsel for the respondents disputed the interpretation of the case law relied on by Commission counsel. Counsel reiterated his assertions regarding the original will say of Rainone and those of Brady. Further, counsel stressed the timing of the amended will say in relation to procedural fairness to the respondents. With respect to the issue of taint, counsel submitted that the jurisprudence referred to did not establish the principle asserted by Commission counsel. To assert that permitting respondents' counsel to testify would "taint" the procedings was without merit. Finally, counsel argued that the Commission was responsible for the current dispute in seeking to admit amended will say and the Commission should not be accorded a procedural advantage as a result.

The complainant did not file submissions on this issue.

It is useful to commence the analysis with reference to an earlier ruling, noted above, regarding the admissibility of the "Hines letter". That letter referred to the October 1991 meeting; its admission was opposed by Commission counsel on grounds similar to those advanced herein. Rule 10 and case law were referred to in submissions; complainant's counsel concurred in those representations.

I ruled that the document should be admitted; its weight was to be addressed by the parties in final submissions. It is not my intention to review that decision herein except to note the following.

The essence of Rule 10 of the Rules of Professional Conduct is that a lawyer who appears as advocate should not testify before a tribunal (or other adjudicative body). However, the Rule expressly acknowledges that a tribunal has a discretion to disregard that prohibition where it considers appropriate to do so. I concluded, after balancing the various considerations, that it was appropriate to admit the Hines letter into evidence without requiring that counsel testify and remove himself as counsel of record. The issue was narrowly framed and departed only marginally from the general thrust of Rule 10.

In the instant case, the issue is not merely the admission of a letter dating from October 1991 but the

prospect of counsel giving viva voce testimony. Further, there is the question of the linking, as counsel for the respondents asserts, of the admission of the revised will say statement of Rainone and the testimony of respondents' counsel.

I reject the argument of Commission counsel that, to permit respondents' counsel to testify, would taint the proceedings. I further reject the notion that, should counsel for the respondents testify, I would be put (to quote Commission counsel) "in the invidious or unseemly position of (hypothetically) having to determine whether Mr. Hines is a liar, and as part of the same decision-making process, evaluate Mr. Hines' and other counsel's submissions as to the credibility of other witnesses and as to their statements of the law". There is no doubt that having counsel testify would subject counsel (as any other witness) to arguments related to his/her credibility. That said, it is relatively rare that a tribunal, in reaching its determinations as to credibility, concludes that a witness "lied". The usual assessment is that witnesses give their testimony to the best of their abilities but that the evidence of some is more reliable for reasons which include such matters as demeanour, strength and consistency of recollection particularly in cross-examination, lack of self-interest, consistency with documentary material and what is reasonably probable in all the circumstances.

Thus, I do not regard the "taint" argument as compelling. If such were the case, there would not be express recognition in Rule 10 of the discretion of a tribunal to admit such evidence. Nor do I read the jurisprudence cited as prohibiting such evidence in all cases. It is clear that the testimony of counsel who appears as advocate is to be avoided if possible but it is recognized that, in individual instances, the balancing of the various interests would support permitting counsel to testify.

Thus, it is necessary for me to determine whether, in this case, it is appropriate to permit respondents' counsel to testify about the October 1991 meeting.

Of critical import is an assessment of the original will say statements of Rainone and Brady regarding the October 1991 meeting. On review, I am not persuaded that the account by Brady of that meeting was accepted or, to use the phrasing of respondent counsel, was uncontradicted. The conflict is

certainly more clearly defined in the amended will say of Rainone but I am of the view that the earlier document does not amount to an unequivocal acceptance of Brady's account. Without the testimony now proffered by Rainone through the amended will say, it may well have been that I ultimately had to weigh, inter alia, Brady's account against Rainone's statement of her practice rather than her direct recollection. What would have been the outcome of that assessment cannot be predicted nor is such relevant at this juncture.

Having concluded that the original will says did raise a conflict about the October 1991 meeting, I regard the question as to whether counsel for the respondents should testify (given his attendance at the meeting) arose at that point. It may well be understandable that, given the nature of the conflict, the respondents chose not to file a will say by respondent's counsel attesting to his recollection of the October meeting in view of the possible consequences of filing such a statement. That calculation is qualitatively different from a situation where there has been an unequivocal acceptance of the respondents' version of the meeting which is later repudiated. Again, in my opinion, that is not this case.

Accordingly, I am not persuaded that I should exercise my discretion to uphold the motion of counsel for the respondents. As noted earlier, I accept the view that counsel should not generally appear as advocate and witness in the same proceeding. I do not consider that the circumstances in which the issue has arisen is such that my discretion should be exercised to permit counsel to testify without the requirement that he withdraw as counsel. The respondents will have to determine whether they wish to seek to file a will say by counsel at this stage in the proceedings or are content to proceed on the abuse motion on the basis of the current will says and argue the weight that should be accorded to the amended will say of Rainone in final submissions on the abuse motion.

My decision to deny counsel's motion carries no implication with respect to my response to a motion to adjourn (if such was sought by the respondents) to permit a will say to be filed and the retaining of other counsel. Moreover, the parties did not address the issue of whether another counsel from the same firm could act for the respondents. I make no comment on that other than to note that in

the original motion of the Commission to remove respondents' counsel, the Commission asserted that it did not object to that option. Nor, in my view, is there an adverse inference to be drawn if the respondents determine that, in all the circumstances, they will proceed on the basis of the current will says and viva voce evidence and forego pursuing the route of respondents' counsel appearing as witness.

Finally, there should be no inference drawn from this ruling as to the ultimate disposition of the earlier motion which is reserved, notwithstanding that both bear some similarity. To restate that preliminary motion briefly, Commission counsel moved that Mr. Hines be removed as counsel of record and counsel for the respondents moved, in the alternative, that the complaint and reprisal allegations be severed. I continue to reserve my ruling on those matters. In my view, the earlier motion raised considerations broader than those in connection with the "Hines letter" and somewhat different from those relating to the instant dispute. I consider that the appropriate balancing of various considerations relating to the exercise of my discretion in such matters is best determined on a case by case (or, motion by motion) context.

Given my ruling with respect to the calling of respondents' counsel as a witness, I turn to the issue of the admission of the amended Rainone will say.

I am troubled by the timing of the request to file the amended will say statement of Rainone in view of the date of the original will say statement. It must be remembered that the rationale for the filing of the will say statements was to expedite the hearing, as outlined above. In my view, where a process is established to facilitate the hearing, the adjudicator must be sensitive to the competing concerns that the "process" not be so rigid as to undermine its original intent and/or a fair hearing and, secondly, that parties who depart from the process do not thereby gain an unfair advantage over those who comply. Having considered these matters, I have concluded that the amended Rainone will say should be admitted.

The amendment is not a wholesale revision to Rainone's original will say. In her viva voce testimony,

Rainone could state, in direct examination, that she did not affirm the original will say was accurate in respect of the October 1991 meeting and, at that point, clarify her recollection. I do not consider it appropriate to require a witness to affirm a will say statement which is no longer regarded as accurate. Disclosure of the "amendment" now, rather than on the witness stand, is preferable and, indeed, I would have considerable difficulty with a situation where counsel was aware that the original will say would be amended on the stand and proceeded without prior notice to the other parties.

Moreover, as I stated at the hearing, it is open to counsel for the respondents to fully explore, on cross-examination, the circumstances and reasons for the change in the will say if counsel so chooses. I consider that opportunity the appropriate mechanism for testing the recollection of the witness and/or challenging the bona fides of the amended will say.

For the foregoing reasons, the motion of respondents' counsel is refused and the amended will say of Rainone is filed, subject to the right of cross-examination as set out above.

DATED this April 9, 1996.

Susan Tacon, Adjudicator